

No. _____

IN THE
Supreme Court of the United States

FIVE STAR QUALITY CARE, INC.,
Applicant,

v.

LOURDES LEFEVRE,
Respondent.

**APPLICATION TO THE HON. ANTHONY M. KENNEDY
FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE
A PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

Pursuant to 28 U.S.C. § 2101(c) and Rule 13.5 of the Rules of this Court, Applicant Five Star Quality Care, Inc. (“Five Star”) hereby moves for an extension of time of 45 days, up to and including Friday, April 20, 2018, for the filing of a petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit dated December 6, 2017 (attached as Appendix A). The jurisdiction of this Court is based on 28 U.S.C. § 1254(1).

1. The date within which a petition for a writ of certiorari would be due, if not extended, is March 6, 2018. This application is being filed more than 10 days before that date.

2. This case concerns the lawfulness of a California state rule that invalidates agreements to arbitrate disputes by prohibiting the waiver of representative claims if brought under California’s Private Attorneys General Act

(“PAGA”), Cal. Lab. Code § 2698, *et seq.* The California Supreme Court set forth the rule at issue here in *Iskanian v. CLS Transportation Los Angeles, LLC*, 327 P.3d 129 (Cal. 2014). The court held, in a case involving the enforceability of an arbitration provision, that, where an “employment agreement compels the waiver of representative claims under the PAGA, it is contrary to public policy and unenforceable as a matter of state law.” *Id.* at 149. The court also held that the Federal Arbitration Act (“FAA”), 9 U.S.C. § 1 *et. seq.*, does not preempt its rule invalidating arbitration provisions. *Id.* at 149-53.

3. In May 2015, Lourdes Lefevre (“Lefevre”) filed a class action complaint in a state court in California that included representative PAGA claims for alleged violations of California labor laws. Five Star timely removed the case to federal court and moved to compel arbitration pursuant to the parties’ arbitration agreement. The agreement required the parties to arbitrate claims arising out of Lefevre’s employment with Five Star, and required that any such claims be arbitrated on an individual basis.

4. On December 11, 2015, the district court denied Five Star’s motion to compel arbitration as to Lefevre’s representative PAGA claims. Order Den. in Part Def.’s Mot. to Compel Arbitration, *Lefevre v. Five Star Quality Care, Inc.*, EDCV 15-1305-VAP (Dec. 11, 2015), ECF No. 25. The court first determined that, despite the parties’ agreement that Maryland law would govern disputes about the enforcement of the arbitration agreement, California law should apply. In the court’s view, PAGA is a “fundamental policy” of California, and thus displaces choice-of-law

provisions in parties' arbitration agreements. *Id.* at *4-7. The court then found that "Plaintiff could not have waived by arbitration agreement her right to bring representative PAGA claims," *id.* at 8, and thus, she may maintain such claims.

5. The Ninth Circuit affirmed. *Lefevre v. Five Star Quality Care, Inc.*, 705 F. App'x 622 (9th Cir. 2017). The Court of Appeals upheld the district court's determination that, despite the choice-of-law provision in the parties' agreement, Maryland law should not apply, and, instead, California law should apply. *Id.* at 622-23. It then held that, pursuant to the California Supreme Court's *Iskanian* rule and Ninth Circuit precedent, arbitration provisions that have the effect of waiving representative PAGA claims may not be enforced. *Id.* at 623.

6. This case presents legal questions of substantial importance regarding FAA preemption. The FAA reflects a "liberal federal policy favoring arbitration," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), and requires that courts "place arbitration agreements on an equal footing with other contracts," *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)). The Ninth Circuit's decision in this case conflicts with those requirements. In particular, the Ninth Circuit's decision disregards this Court's determination that agreements to arbitrate *individually*, rather than on a class or representative basis, must be enforced according to their terms. *See Concepcion*, 563 U.S. at 344–52. Further, the Ninth Circuit's holding is inconsistent with this Court's FAA jurisprudence,

including recent decisions in *Kindred Nursing Centers Ltd. Partnership v. Clark*, 137 S. Ct. 1421 (2017), and *DIRECTV v. Imburgia*, 136 S. Ct. 463 (2015).

7. Applicant's Counsel of Record in this case, Clifford M. Sloan, has had substantial obligations in advance of the current due date of the petition. In particular, he was counsel to a criminal defendant in a seven-week, complex insider trading trial in the United States District Court for the Central District of California that began on January 9, 2018 and ended on February 21, 2018.

8. In addition, Mr. Sloan has substantial ongoing obligations, including, in this Court, in *Starr International Company, Inc. v. United States* (No. 17-540), for which a certiorari-stage reply brief will be filed the week of February 26, 2018.

9. Mr. Sloan also has a variety of other ongoing briefing obligations during the months of February and March, including a brief in the United States Court of Appeals for the District of Columbia Circuit due in late February; post-trial briefing in his criminal case in the United States District Court for the Central District of California due in early-March; and briefing on a motion to dismiss in a complex civil rights case in the United States District Court for the Eastern District of Louisiana due in mid-March.

10. In addition, Mr. Sloan and applicant Five Star recently received a decision from the Ninth Circuit in *Mandviwala v. Five Star Quality Care, Inc.*, No. 16-55084, 2018 WL 671138 (9th Cir. Feb. 2, 2018), in which the court again declined to enforce an arbitration agreement in light of PAGA and California Supreme Court and Ninth Circuit precedent. Five Star anticipates seeking certiorari in that case

as well. Because the two cases raise similar questions presented, it may be of aid to the Court to receive and consider the petitions on or around the same date.

11. An extension of time will not prejudice Respondent.

For the foregoing reasons, Five Star hereby respectfully requests that an extension of time to and including April 20, 2018 be granted within which Five Star may file a petition for a writ of certiorari.

Respectfully submitted,

s/ Clifford M. Sloan

Clifford M. Sloan

Counsel of Record

Caroline Van Zile

Alex Haskell

SKADDEN, ARPS, SLATE, MEAGHER &

FLOM LLP

1440 New York Avenue, NW

Washington, DC

(202) 371-7000

cliff.sloan@skadden.com

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Counsel for Applicant

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, there is no parent corporation or publicly held company owning 10% or more of Five Star Quality Care, Inc.'s stock. ABP Acquisition LLC, a wholly owned subsidiary of ABP Trust, owns approximately 37% of Five Star Quality Care, Inc.'s stock.